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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

OREGON LABORERS-EMPLOYERS HEALTH & WELFARE FUND, ET AL.,
Petitioners,
v.
PHILIP MORRIS, INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (99-642)

****

LABORERS LOCAL 17 HEALTH AND BENEFIT FUND, ET AL.,
Petitioners,
v.
PHILIP MORRIS, INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT (99-791)

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Petitioners in Nos. 99-642 and 99-791 agree with, and join in, the Reply Brief for Petitioners filed in No. 99-545 on the proximate cause/standing question. The same question is presented by Nos. 99-642 and 99-791. The decisions below are unprecedented. They have disabled the only conceivable plaintiffs from suing under the RICO and antitrust laws for the multibillion-dollar tobacco-related economic loss at issue.

1. ***Importance of the questions presented.*** The Reply Brief for Petitioners filed in No. 99-545 demonstrates that the decisions below conflict with each other, with decisions of this Court, and with decisions in other circuits. Yet certiorari would be warranted even in the absence of any conflicts among the lower courts because of the overriding importance of the multibillion-dollar question presented, which could scarcely have greater implications for the public health. Both *FDA v. Brown & Williamson*, No. 98-1152, and the filing of the federal tobacco lawsuit demonstrate that this is an instance where certiorari would be appropriate even in the absence of the conflicts within the lower courts. *See, e.g., Eastern Enterprises v. Apfel*, 118 S. Ct. 2131, 2144 n.4 (1998) (granting review and reversing, despite the absence of circuit conflict and despite denials of cert. on same issue in 1995, 1996, and 1997); *National Credit Union Admin. v. First Nat. Bank & Trust Co.*, 118 S. Ct. 927, 933 & n.2 (1998) (granting review despite agreement between circuits, "[b]ecause of the importance of the issue presented").

2. ***Beck v. Prupis.*** At a minimum, the instant petitions must be held pending the decision in *Beck v. Prupis*, No. 98-1480, which presents a similar proximate cause issue under RICO and *Holmes*. The arguments of respondents in this case are the same (in some places virtually word-for-word) as those of the respondents in *Beck*. *See* Br. of Respondents in No. 98-1480 at 29 (contending that the plaintiff "does not satisfy the proximate cause standards identified in *Holmes*") (quoting argument heading); *id.* at 30 ("Beck is merely an indirect victim of the RICO violation and is not the most efficient enforcer of the statute") (quoting argument heading); *id.* ("the tendency in damages 'is not to go beyond the first step'") (quoting

Holmes); *id.* at 30-31 ("the proximate cause rule demands 'some direct relation between the injury asserted and the injurious conduct alleged' and precludes recovery by a plaintiff who complains of harm 'flowing merely from the misfortunes visited upon a third person by the defendant's acts'") (quoting *Holmes*); *id.* at 31 (explicating *Holmes* factors); *id.* at 34 (warning of "multiple treble damage awards"); *see also* Petrs. Reply Br. in No. 98-1480 at 12 ("Beck was directly injured by the violation of § 1962(d) and he has satisfied the proximate cause analysis required by *Holmes*"). At minimum, therefore, the instant petitions must be held in light of *Beck*.

3. ***Injunctive relief.*** In addition to the standing/proximate cause issue, Nos. 99-642 and 99-791 present separate, and vitally important, questions regarding the availability of RICO injunctive relief to private parties — questions over which the lower courts are deeply divided. As the Third Circuit has noted, "circuits are split on the issue" of whether injunctive relief is available to private plaintiffs under RICO. App. in No. 99-545 at 39a n.20. *See also Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 605 n.5 (5th Cir. 1998) ("there is some question whether RICO affords private litigants the option of equitable remedies") (citing cases); *Airlines Reporting Corp. v. Barry*, 825 F.2d 1220, 1223 (8th Cir. 1987) ("several district courts have reached conflicting conclusions on this issue") (citing cases); *NOW v. Scheidler*, 897 F. Supp. 1047, 1082 (N.D. Ill. 1995) ("the circuits are divided on whether private parties may petition the court for injunctions for civil RICO violations") (citing cases).

The Fourth Circuit has expressly affirmed the award of private injunctive relief under RICO. *Faircloth v. Finesod*, 938 F.2d 513, 518 n.11 (4th Cir. 1991). Other courts of appeals have permitted injunctive relief on a showing of irreparable injury and substantial likelihood of success on the merits. *E.g.*, *Foxboro Co. v. Arabian American Oil Co.*, 805 F.2d 34 (1st Cir. 1986); *Humana, Inc. v. Avram Jacobson*, 804 F.2d 1390 (5th Cir. 1986); *Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351 (10th Cir. 1986); *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982). Numerous district courts have read the law of their respective circuits as authorizing injunctive relief. *See*

Chambers Dev. Co. v. Browning-Ferris Indus., 590 F. Supp. 1528, 1540-41 (W.D. Pa. 1984); *Aetna Casualty & Surety Co. v. Liebowitz*, 570 F. Supp. 908, 910-11 (E.D.N.Y. 1983), *aff'd on other grounds*, 730 F.2d 905 (2d Cir. 1984); *Marshall Field & Co. v. Icahn*, 537 F. Supp. 413, 420 (S.D.N.Y. 1982); *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 518 F. Supp. 993, 1014 (S.D. Tex. 1981).

Respondents' own authorities acknowledge that, while the Ninth Circuit has held injunctive relief unavailable, "[o]ther courts of appeals in dicta have split over the issue, as have the district courts, although most commentators have argued that injunctive relief should be available." *In re Fredeman Litig.*, 843 F.2d 821, 828 (5th Cir. 1988) (citing numerous cases and law review articles but ultimately not deciding question).

These cases are an ideal vehicle for resolving the uncertainty. In No. 99-642, the *sole* ground cited by the Ninth Circuit in denying injunctive relief was that RICO injunctive relief is not available to private parties under *Religious Technology Ctr. v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987). *See* App. in No. 99-642, at 19a. The legal question framed by petitioners is thus cleanly presented. Tellingly, respondents offer no defense on the merits for the Ninth Circuit's decision. The author of RICO has written that failure to provide equitable relief for civil RICO plaintiffs would be "inconsistent with the text, legislative history and purpose of RICO." Blakey & Cessar, *Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO Be Effective Only Against White-Collar Crime?*, 62 NOTRE DAME L. REV. 526, 528 (1987).[1]

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[1] Because the injunctive relief issue is clear, there was no need for petitioners' briefs below to discuss the issue at length. Even so, petitioners' brief before the Ninth Circuit stressed that "[i]njunctive claims under antitrust and RICO are not subject to proximate cause or standing limitations, which only apply to claims for damages." CA Br. at 47.

Nor is a showing of injury to "business or property" under 18 U.S.C. § 1964(c) a prerequisite to RICO injunctive relief (Opp. Cert. 20), because a court may award such relief on the basis of its general equitable powers. In any event, petitioners have clearly shown injury to business or property, as noted in the Reply Brief for Petitioners filed in No. 99-545.

In No. 99-791, the Second Circuit applied the *Holmes* factors to a claim for injunctive relief under RICO, despite the unanimous holdings of other circuits that such factors do not apply to injunctive claims under the antitrust laws, a sister statute. This uniform antitrust precedent is determinative on the question in the RICO context. As this Court has noted, "[t]he clearest current in th[e] history [of RICO] is the reliance on the Clayton Act model." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489 (1985). The RICO Senate report, for example, explained that "[t]he committee feels . . . that much can be accomplished here by adapting the civil remedies developed in the antitrust field to the problem of organized crime." S. Rep. No. 91-617, 91th Cong., 1st Sess. 83 (1969). Respondents cannot cite a single case in their opposition supporting the Second Circuit's approach.

Certiorari is thus independently warranted on the questions relating to injunctive relief presented by Nos. 99-642 and 99-791.

CONCLUSION

The petitions for writ of certiorari should be granted.

Respectfully submitted.

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